Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

TERESA L. LUKE AND ANDREW R. LUKE, INDIVIDUALLY AND ON BEHALF OF THEIR MARITAL COMMUNITY; AND TERESA L. LUKE, AS GUARDIAN AD LITEM FOR HER MINOR CHILDREN, H. R. LUKE AND R. A. LUKE,

Petitioners,

V.

EMERGENCY ROOMS, P.S., A PROFESSIONAL SERVICE CORPORATION OF WASHINGTON STATE D/B/A FAMILY CARE AND URGENT MEDICAL CLINICS AND FAMILY URGENCY CARE CLINICS MINNEHAHA; ROBERT D. THORNTON, M.D.; ET AL

Respondents.

On Petition for a Writ of Certiorari To The United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(1) Is the district court required to follow it's own Fed. R. Civ. P. 16 scheduling order in considering the non-movants' expert evidence in a subsequent summary judgment hearing?

(2) Did the district court err in failing to provide the non-moving party the benefit of all reasonable doubts and inferences in finding that earlier submitted expert witness disclosures failed to establish a genuine issue of material fact?

Plaintiffs sued defendants for medical negligence for failing to perform basic blood tests when beginning the drug Antabuse. As a result of the failure to perform the blood tests, plaintiff Teresa Luke required a liver transplant when the Antabuse destroyed her liver.

During discovery the district court entered an order modifying Fed. R. Civ. P. 26(a)(2) to permit opinions from depositions to be admissible and extended deadlines for disclosure of expert opinion.

Defendants conceded negligence and moved for summary judgment on causation. Plaintiffs filed five expert declarations in opposition. Without acknowledging or discussing it's own scheduling order, the district court found the declarations to be "late", refused to consider them and dismissed the case. The Ninth Circuit, in a 2-1 decision, affirmed, the dissent stating that the majority failed to give the non-moving party the benefit of all reasonable doubts and inferences from the opinions contained in the witness disclosures.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Ninth Circuit.

The petitioners here and appellants below are Teresa L. Luke and Andrew R. Luke, individually and on behalf of their marital community; and Teresa L. Luke, as Guardian ad Litem for her minor children, H. R. Luke and R. A. Luke,

The appellees below and respondents here are Emergency Rooms, P.S., a Professional Service Corporation of Washington State d/b/a Family Care and Urgent Medical Clinics and Family Urgency Care Clinics Minnehaha; Robert D. Thornton, M.D.; Howard Bruce Goodwin, PA-C.

Pursuant to Rule 29.6, petitioners state that plaintiffs are individuals and are not corporate entities.

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The opinion of the Court of Appeals is unpublished but is found at 2009 WL 886350(9th Cir.(Wash.)) and is reprinted in the Appendix to the Petition ("Pet. App.") at A1. The District Court's opinion is unpublished but is found at 2008 WL 410672 (W.D. Wash.) and is reprinted in Pet. App. at B1.

The related prior opinion of the Court of Appeals is unpublished but is found at 246 Fed.Appx. 421, 2007 WL 2461850 (C.A.9 (Wash.)) and is reprinted in Pet.App. at C1. The District Court's opinion resulting in that appeal is unpublished but is found at 2005 WL 3533616 (W.D. Wash.)) and is reprinted in Pet. App. at D1.

JURISDICTION

The Court of Appeals entered its judgment on March 30, 2009. This Court has jurisdiction under 28 U.S.C. § 1291. Original jurisdiction in the District Court is under 28 U.S.C. § 1332.

COURT RULES INVOLVED

This case involves Fed. R. Civ. P. 26(a)(2)(C), Fed. R. Civ. P. 26(e)(1), Fed. R. Civ. P. 37(c)(1) and Fed. R. Civ. P. 16(b)(6).

STATEMENT OF THE CASE

The district court completely ignored its own Fed. R. Civ. P. 16 order expanding admissible expert opinion including deposition testimony and dismissed plaintiffs' claims. The Ninth Circuit perpetuated this legal error with neither court ever acknowledging or discussing the Fed. R. Civ. P. 16 scheduling order in either decision. Further, the Ninth Circuit failed to construe all reasonable

inferences in favor of the non-moving party. As recognized in the dissenting opinion, the district court's dismissal should be reversed. These collective reversible errors have deprived Teresa Luke of her day in court. Absent Supreme Court intervention, her right to a jury trial will be forever foreclosed.

A. Factual Background

Teresa Luke, age 32, is married to Andrew Luke and has two children, H. R. Luke, age 12 and R. A. Luke, age 9. On March 7, 2002, Ms. Luke was cited for driving under the influence in Vancouver, Washington. As a condition for her release from jail, the judge of Vancouver District Court directed her to take the drug Antabuse, designed to stop people from drinking, and was directed to report to the defendant Clinic.

On March 12, 2002, Ms. Luke saw H. Bruce Goodwin, PA-C, a physician assistant practicing at defendant Clinic in Vancouver, WA. Mr. Goodwin prescribed Antabuse to Ms. Luke without performing recognized baseline and follow up liver function tests; without advising Ms. Luke to be on the lookout for symptoms of hepatitis; without having a plan for follow up physical examination; without informing Ms. Luke of the material risk of hepatitis with Antabuse, a known potentially hepatotoxic drug; and without discussing with Ms. Luke the need for simple baseline and follow up liver function tests. Ms. Luke saw Mr. Goodwin only once, on March 12, 2002, the day he wrote the prescription for Antabuse.

After receiving the Antabuse prescription from Mr. Goodwin, Ms. Luke went to defendant Pharmacy, located across the street from defendant Clinic, where the prescription was filled. The Antabuse medication was mixed into a slurry by the pharmacist, and was then administered to

Ms. Luke by the pharmacist who then observed her drink the slurry, and recorded her compliance in taking the Antabuse on a court required log. Ms. Luke visited defendant Pharmacy 36 times between March 12, 2002 and June 3, 2002.

On June 3, 2002, Ms. Luke reported to the pharmacist that she was having nausea and vomiting and that when she had taken the Antabuse, her stomach felt like it was cramping up really bad. She also pointed out that the corners of the whites of her eyes were starting to turn yellow.

Later that same day, Ms. Luke returned to defendant Clinic where she was seen by a physician. Liver tests were obtained and revealed abnormally elevated liver enzymes. Five and a half weeks later, on July 12, 2002, Ms. Luke underwent a liver transplant.

After Ms. Luke experienced fulminant liver failure, which necessitated a liver transplant as a direct and proximate result of the Antabuse, the Luke Plaintiffs filed suit against defendant Clinic and defendant Pharmacy. It is undisputed that the drug, Antabuse, was ordered, administered and monitored without anyone ordering or obtaining baseline liver function studies or follow up liver function studies on Ms. Luke. These studies are universally recommended in the practice of medicine when prescribing Antabuse.

It is also undisputed that Ms. Luke was never advised by any of the defendants of the need for liver function tests or of her risk of liver failure from Antabuse. Two separate motions for summary judgment were filed, one by defendant Pharmacy and the other by defendant Clinic. The district court granted both motions. (The dismissal of defendant Pharmacy is not at issue here.)

In its summary judgment motion, defendant Clinic sought dismissal of all claims, or, alternatively partial summary judgment, on the basis that the Luke Plaintiffs could not prove that

any action or inaction of defendants caused them any harm.[1]

In response, the Luke Plaintiffs argued that expert witness disclosures established a prima facie case of causation and in addition submitted declarations from five (5) competent experts establishing duty, breach, causation and damage on all elements of the claims. Those witnesses were Dr. John Rabkin, a liver transplant surgeon; Dr. Andrew Saxon, head of the Seattle Veteran's Administration Hospital Department of Addiction Medicine who prescribes Antabuse; Dr. Christopher Corless, the pathologist who examined Ms. Luke's liver after it was surgically removed; Dr. Phyllis Hollenbeck, a family practitioner; and Morris Faiman, Ph.D., a professor of Pharmacology and a Pharmacist at the University of Kansas.

The district court made no reference, whatsoever, in its opinion to the sworn testimony of the plaintiffs' exhaustively detailed declarations from these five (5) competent expert witnesses, and without hearing oral argument, dismissed plaintiffs' claims against defendant Clinic on December 22, 2005.

Plaintiffs appealed to the Ninth Circuit, which reversed and remanded for a determination by the district court regarding the admissibility of the declarations. On remand the district court held the declarations to be "late" and ignored its own order which is reprinted in Pet. App. At E1. The Ninth Circuit on appeal of that order affirmed in a 2:1 decision. Petitioners now seek a Writ of Certiorari.

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[1] Issues additionally raised were that the Luke Plaintiffs could not state an informed consent claim; and that the Luke Plaintiffs were unable to state the elements of a claim against Dr. Fisher, who treated Ms. Luke for a tick bite on April 30, 2002, at defendant Clinic. The district court granted dismissal of those claims, the Ninth Circuit affirmed, and plaintiffs did not further appeal the dismissal of those claims and they are therefore not at issue here.

B. Proceedings Below

On November 11, 2004, the Plaintiffs filed a medical negligence suit against the defendants/appellees. The Plaintiffs alleged that the defendants violated the standard of care in regards to the prescription and, administration, of the drug Antabuse[2], and the violation was a direct and proximate cause of Ms. Luke's fulminant liver failure, which necessitated a liver transplant on July 12, 2002.

On July 13, 2005, defendant Pharmacy filed a Motion for Summary Judgment. The district court granted defendant Pharmacy's motion on August 31, 2005. [3]

On November 18, 2005, defendant Clinic filed a Motion for Summary Judgment. The Luke Plaintiffs submitted declarations from five competent medical experts establishing duty, breach, causation and damage on all elements of the claim. Making zero reference to these declarations, the district court granted defendant Clinic's motion on December 22, 2005. Plaintiffs appealed on January 19, 2006, and the Ninth Circuit in Appeal No. 06-35056 in a memorandum decision upheld dismissal of the Pharmacy defendants and dismissal of some but not all of the Clinic defendants and reversed and remanded for a determination by the district court of consideration of admissibility of plaintiffs' submitted declarations and to consider the motion for summary judgment anew. An amended mandate was entered on

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[2] Antabuse is also known as Disulfiram.

[3] Defendant Pharmacy's motion was granted by the district court. On appeal, the Ninth Circuit upheld the dismissal. Plaintiffs did not further appeal that decision and therefore no issues are before this Court regarding the Pharmacy defendants.

September 27, 2007. Following the mandate, the defendant Clinic filed a motion to strike and renewed their motion for summary judgment. The district court granted those motions and a second appeal to the Ninth Circuit followed.

The Ninth Circuit majority, making no reference to the order (Pet. App. at E1) entered by the district court judge which modified the expert testimony disclosure requirements, described the declarations as "late", refused to consider them and dismissed the case on March 30, 2009. The dissent by M. Smith, Circuit Judge, stated that the majority had failed to give all favorable inferences to the plaintiffs based on the original expert disclosures and stated the decision of the district court should be reversed. This Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit Has Sanctioned A Complete Departure From The Accepted And Usual Course Of Judicial Proceedings Calling For This Court To Exercise Its Supervisory Power.

A. The District Court Should Not Be Allowed to Disregard Its Own Order Dated September 26, 2005.

The district court signed an order on stipulation of the parties modifying the pretrial scheduling order. It is well established law that the final pretrial scheduling order of the court supercedes all pleadings and controls the subsequent course of the case. Rockwell International Corp., et.al. v. United States, et. al., 549 U.S. 1397, 127 S.Ct. 1397, L.Ed.2d 190 (2007).

Fed. R. Civ. P. 16 governs pretrial conferences and scheduling management. Fed. R. Civ. P. 16

requires the court to issue a scheduling order setting procedures for discovery and trial. The order is binding unless subsequently modified by the court.

Fed. R. Civ. P. 16 (b) provides that the pre trial schedule may be modified for good cause and with the judge's consent. Pursuant to Fed. R. Civ. P. 29, Stipulations About Discovery Procedure, subsection (b), a stipulation extending the time for any form of discovery must have court approval if it would interfere with the time set for completing discovery, for hearing a motion, or for trial.

Plaintiffs submitted their expert declarations in response to the summary judgment within the time frame set by the court's order. Both the district court and the Ninth Circuit have failed to abide by the district court's own order.

B. The District Court's Order

The decision of the district court appealed from has as its foundation a "failure" of plaintiffs to "comply with the scheduling orders and Fed. R. Civ. P. 26(a)(2)." Fed. R. Civ. P. 16 provides for the court to enter scheduling orders regarding disclosure of witnesses pursuant to Fed. R. Civ. P. 26(a) and Fed. R. Civ. P. 26(e)(1). Fed. R. Civ. P. 16(b)(6) provides that scheduling orders may be modified by the court. The parties stipulated in March 2005 that the initial disclosures were waived. The original scheduling order called for disclosure of expert reports and opinions on August 22, 2005. On August 9th, defense counsel forwarded a letter and proposed stipulation, to modify the scheduling order to:

> ... allow experts to testify about matters which may be covered in their depositions, but which may have been omitted from their witness statements. It

> does not allow testimony about matters which are not covered in either the statement or the deposition. Accordingly, since all matters about which testimony will be allowed were disclosed in one fashion or the other, there should be no prejudice to any party through the stipulation. (Emphasis supplied).

Counsel for the parties conferred and agreed specifically that experts named would be allowed to testify to all matters within the disclosure and within their deposition testimony. This was reduced to a stipulation signed by counsel and an order was entered by this court on September 26, 2005. The language of the Stipulation and Order (Pet. App. At E1.) is:

> The parties hereby stipulate as follows:
>
> 1) Expert disclosures and reports will be exchanged in accordance with the calendar established by the court, but such reports need not be "prepared and signed" by each expert; and
>
> 2) In addition to being permitted to testify about matters addressed in each expert witnesses' disclosure, a properly disclosed expert is also permitted to testify regarding any matters addressed in that expert's deposition.
>
> The purpose of the foregoing stipulation is, respectfully, 1) to facilitate preparation and exchange of reports, and 2) to allow testimony regarding relevant matters which may have been omitted from the disclosure statements, where the omission causes no prejudice since the

> omitted matter was addressed in an expert's deposition. (Emphasis supplied).

C. The District Court Misread and Misquoted Plaintiffs' Disclosures.

The district court, at page 5 of its decision (Pet. App. B1) Striking Expert Declarations and Granting Summary Judgment, shows its erroneous reading of the plaintiffs' disclosures. The Order states at Pet. App. B6:

> "All of Plaintiffs' experts in initial disclosures stated that the change in liver functions **could not be detected until sometime between two and four weeks** after initiation of Antabuse, thereby acknowledging that on a more likely than not basis, the elevated liver levels would not be detectable until the 28th day after Ms. Luke started taking Antabuse." (Emphasis supplied).

The district court incorrectly states the disclosure language and substitutes words that are not there. The words "could not be detected" appear nowhere in plaintiffs' disclosures or anywhere else in any of plaintiffs' pleadings. The words "until sometime" again are words that do not appear anywhere in plaintiffs' disclosures or anywhere else in any of plaintiffs' pleadings. The district court order on its face recites incorrect quotations and establishes the erroneousness of its decision.

D. The Plaintiff's Experts.

Plaintiffs submitted five (four are discussed here) expert declaration, all within the time frame allowed by the motion and by the order (Pet. App. E1)

1. John Rabkin, M.D.

Dr. Rabkin is a transplant surgeon. The substance of his testimony was disclosed in the expert witness disclosures on August 22, 2005. Dr. Rabkin signed a declaration on December 8, 2005 which was timely submitted in opposition to defendants' motion for summary judgment. Eight days later, on December 16, 2005, and four days after the declaration had been filed with the court, Dr. Rabkin's deposition was taken wherein he detailed his opinions. Defendants' counsel specifically asked Dr. Rabkin his opinion as to when liver function tests would be elevated:

> Q. Now, I'm going to ask you the question like we do in court, on a more probable than not basis, in other words 51 percent, more likely than not, two weeks after she started Antabuse, knowing that her symptoms don't appear until late in May, on a more probable than not basis, is it your opinion that the liver function tests would have been abnormal two weeks after she was given the medication?
>
> A. Yes.

Clearly, Dr. Rabkin's deposition testimony establishes that testing at two weeks would have shown an abnormality. Equally clear is that this testimony is admissible by the order of the court of

September 26, 2005 which allowed "any matter" either in the disclosures or in deposition to be admissible testimony at trial.

2. Andrew Saxon, M.D.

Dr. Saxon is a practicing psychiatrist who regularly prescribes the drug Antabuse and has written in the medical literature about its risks. He was deposed on August 23, 2005, well prior to the summary judgment. His declaration in connection with the summary judgment was submitted on December 8, 2005. The disclosure of his testimony occurred on August 22, 2005. In the witness disclosure for Dr. Saxon it was stated as follows:

> It is Dr. Saxon's opinion based on reasonable medical probabilities that Ms. Luke's baseline liver function studies would have been normal on March 12, 2002. Assuming her baseline liver studies were normal on March 12, 2002, it is his further opinion that between two and four weeks after beginning Antabuse, Ms. Luke's liver function studies would have been abnormally elevated .... Had PA-C Goodwin obtained a follow-up liver function study within two to four weeks after prescribing Antabuse, more likely than not Teresa Luke's liver function studies would have been abnormally elevated.[4] (Emphasis supplied).

Dr. Saxon was asked in his deposition at page 40 the very next day following disclosure, on

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[4] This language appears in the expert witness disclosure statement for Dr. Hollenbeck and Dr. Rabkin.

August 23, 2005, his opinion about when liver function studies would have been abnormal, as follows:

> Q. And you're looking at this case knowing that we can't say for sure what her initial test would be. But I think you said there's nothing to indicate it would have been elevated. Is there a point in this case looking back at it where you feel she would have started to have abnormal liver function findings?
>
> A. You know, based on what we see in the literature that the -- these hepatotoxic reactions seem to occur fairly early after starting the Antabuse. So it's highly likely that within a couple weeks or so there would have been some indication on laboratory testing that there was an abnormality. (Emphasis supplied).

3. **Phyllis Hollenbeck, M.D.**

Dr. Hollenbeck is a family practitioner. Her opinions were disclosed in the expert witness disclosure on August 22, 2005.

Dr. Hollenbeck signed a declaration on December 11, 2005 for submission in opposition to defendants' motion for summary judgment. Dr. Hollenbeck's deposition was arranged and then cancelled after the Order Granting Summary Judgment was entered. In her declaration, Dr. Hollenbeck stated:

> 2. If, as I believe, Mrs. Luke suffered from an idiosyncratic reaction to Antabuse, her liver laboratory studies would have, more likely than not, been

> elevated anytime following 10 days of initiation of the drug. It is my opinion, therefore, that if Physician Assistant, Goodwin, had complied with the standard of care, more likely than not, the Antabuse would have been discontinued and Mrs. Luke would not have needed the liver transplant. (Emphasis supplied).

If her deposition had gone forward, these opinions would have been part of her testimony and would have been admissible.

4. Christopher Corless, M.D.

Dr. Corless is a pathologist who examined Teresa Luke's liver which had been removed as part of her transplant procedure. Dr. Corless was disclosed as a fact witness and then defendants took his deposition on May 3, 2005. Dr. Corless signed a declaration on December 12, 2005, which was submitted to the district court in opposition to the motion for summary judgment. Dr. Corless stated in his declaration, as follows:

> 4. Based on the fact that my pathologic diagnosis of June 21, 2002 revealed a severe form of cholestatic hepatitis with loss of approximately 50% of the hepatocellular parenchyma, and my pathologic diagnosis of Mrs. Luke's native liver specimen three weeks later (on July 17, 2002) which revealed massive hepatocyte necrosis and marked cholestasis of remaining parenchyma, with a near total loss of hepatocytes in the majority of the specimen, it is my opinion, based on reasonable medical probabilities, "more likely than not," that Mrs. Luke's liver function was beginning

> to be compromised by the hepatotoxic drug Antabuse soon after initiation of Antabuse on March 12, 2002. **If Mrs. Luke had had liver function testing at anytime between March 26, 2002 and June 3, 2002, her liver function tests, specifically her AST, ALT and bilirubin levels, more likely than not, would have been elevated above normal values, which would have represented abnormal liver cell death, or a loss of hepatocytes**. This finding is consistent with subfulminant hepatitis, which tends to develop over time in response to a drug, such as Antabuse, and prior to demonstrated clinical signs and symptoms. (Emphasis supplied).

Dr. Corless' declaration is clearly confined to March 26 to June 3, which is the "two to four week period" following beginning of the Antabuse. His declaration further stated:

> 5. It is my further opinion that if LFT testing had been undertaken between 2-4 weeks after initiating Antabuse (between March 26, 2002 and April 9, 2002) more likely than not, Mrs. Luke's LFTs would have been elevated above normal values. It is my further opinion, that if Mrs. Luke's LFT's were abnormally elevated between 2-4 weeks and her Antabuse discontinued, she would not have gone on to suffer subfulminant hepatitis, which necessitated a liver transplant. (Emphasis supplied).

The stipulation and order entered by this court on September 26, 2005, states that "any matter" provided in the disclosure or testified to in deposition would be admissible testimony at trial.

E. The Expert Witness Disclosures Submitted by Plaintiffs Were Timely, Complied With Fed. R. Civ. P. 26 and Made Out a Prima Facie Case of Causation.

Plaintiffs made their expert witness disclosures, timely, on August 22, 2005. The disclosures were in accord with the modified scheduling order entered on March 22, 2005. The expert witness disclosures for witnesses Dr. Rabkin, Dr. Saxon, and Dr. Hollenbeck contained identical language relating to causation. For example, the relevant disclosure language is as follows as taken from Dr. Rabkin's disclosure:

> 1.2 Complete Statement Of All Opinions To Be Expressed
>
> It is Dr. Rabkin's opinion based on reasonable medical probabilities that Minnehaha Clinic and, specifically, PA-C Goodwin, fell below the standard of care in treating Ms. Luke with the medication, Antabuse, when they failed to do a complete laboratory workup prior to prescribing Antabuse. PA-C Goodwin should have performed baseline liver function studies on March 12, 2002. He should have informed Ms. Luke of the need to return for follow-up liver function studies **within two to four weeks** to make sure she wasn't having any kind of problem related to the medication. In terms of prescribing drugs that may be

hepatotoxic, such as Antabuse, it is a general principle of medicine that a certain standard of care will be followed, which would include pre administration liver enzyme testing and physical exam, to make sure patients don't have underlying liver disease, and close follow up/monitoring of liver enzymes **within two to four weeks**, which also includes a physical exam. If the liver function results were normal **between two and four weeks**, then the standard of care would be to recheck liver function tests at six months and do a physical exam at that time, as well. In this case, it was below the standard of care to for PA-C Goodwin to fail to perform baseline liver function studies on March 12, 2002, and below the standard of care not to have the Ms. Luke return to the clinic **within two to four weeks** for follow-up liver enzyme testing and physical exam.

It is Dr. Rabkin's opinion based on reasonable medical probabilities that Ms. Luke's baseline liver function studies would have been normal on March 12, 2002. **Assuming her baseline liver studies were normal on March 12, 2002, it is his further opinion that between two and four weeks after beginning Antabuse, Ms. Luke's liver function studies would have been abnormally elevated.** The basis for his opinion is that with all the drugs physicians monitor for liver toxicity, such as the statin drugs, the TB drugs, if a patient is going to have an idiosyncratic reaction, it's usually **within two to four weeks** of initiating the drug. That's why the standard of care is to perform pre

> administration liver function studies and then again **within two to four weeks** after starting a hepatotoxic drug. It is his opinion that a person will usually have abnormal liver function tests before they have symptoms associated with liver toxicity.
>
> It is Dr. Rabkin's opinion based on reasonable medical probabilities that Teresa Luke's subfulminant hepatitis and resultant liver transplant were caused by an idiosyncratic reaction to Antabuse. Had PA-C Goodwin obtained a baseline liver function study on Teresa Luke on March 12, 2002 before prescribing Antabuse, more likely than not, it would have been normal. **Had PA-C Goodwin obtained a follow-up liver function study within two to four weeks after prescribing Antabuse, more likely than not Teresa Luke's liver function studies would have been abnormally elevated.** If Antabuse was discontinued on Teresa Luke when her liver enzymes were abnormal **two to four weeks** after starting Antabuse, more likely than not, she would not have gone on to suffer subfulminant hepatic failure and required a liver transplant. (Emphasis supplied)

There are nine references to the "two to four week" period. Each reference is designed to make it clear that there should have been follow up testing in the two to four week period and that if such testing had been done during that period, it would have shown abnormal elevation of liver enzymes.

There are two portions of the disclosure of Dr. Rabkin's opinions where there is a clear statement

that the liver enzymes would have been elevated at between two and four weeks. The first is as follows:

> It is Dr. Rabkin's opinion based on reasonable medical probabilities that Ms. Luke's baseline liver function studies would have been normal on March 12, 2002. Assuming her baseline liver studies were normal on March 12, 2002, **it is his further opinion that between two and four weeks after beginning Antabuse, Ms. Luke's liver function studies would have been abnormally elevated.** (Emphasis supplied)

Again, there can be little question that this disclosure language raises issues of material fact. The second is:

> **"Had PA-C Goodwin obtained a follow-up liver function study within two to four weeks after prescribing Antabuse, more likely than not Teresa Luke's liver function studies would have been abnormally elevated."**

A plain reading of this sentence is that the "two to four weeks" refers to a time frame that PA-C Goodwin should have obtained follow up liver function studies and "more likely than not Teresa Luke's liver function studies would have been abnormally elevated." Even if this sentence were subject to more than one reasonable interpretation, the inference that must be given would be in favor of the plaintiffs as the non-moving party. See Anderson v. Liberty, supra. The inference here is that anytime that follow up studies were done in

the two to four week period, the testing would have shown abnormal elevation of the liver function studies. This disclosure language alone gives rise to an issue of material fact on causation that must result in denial of the summary judgment and reversal of the district court's decision.

Dr. Rabkin's declaration submitted in response to defendant Clinic's motion for summary judgment, reads in pertinent part:

> It is my opinion, more likely than not, that had LFTs been obtained at anytime beginning 10 days after initiating Antabuse (March 22, 2002) through June 3, 2002, the LFTs would have been abnormally elevated, signifying liver cell death. It is my further opinion that if Mrs. Luke's LFTs were abnormally elevated between two to four weeks and Antabuse stopped, she would not have developed subfulminant hepatitis which necessitated a liver transplant.

This declaration testimony establishes that between the two to four week period after initiating Antabuse, LFTs would have been abnormally elevated. There is nothing inconsistent with these expert witnesses stating that the beginning time when liver function studies would be elevated would be at ten days following initiation of the Antabuse and stating in the witness disclosures that if there had been testing at any time between two and four weeks after initiation of the Antabuse that the liver function studies would have been abnormal.

Dr. Rabkin reiterated his disclosure and declaration opinions in his deposition on December 16, 2005:

> Q. Now, I'm going to ask you the question like we do in court, on a more probable than not basis, in other words 51 percent, more likely than not, two weeks after she started Antabuse, knowing that her symptoms don't appear until late in May, on a more probable than not basis, is it your opinion that the liver function tests would have been abnormal two weeks after she was given the medication?
>
> A. Yes. (Emphasis supplied)

F. Defendants' Own Experts Acknowledge the Fact That Testing During the 2-4 Week Time Frame Would Yield Abnormal Liver Enzymes.

Samuel Cullison, M.D., a family practitioner specializing in addiction medicine and hired by the defense, is the supervisor at Evergreen Treatment Services. The protocol regarding Antabuse treatment at Dr. Cullison's clinic states:

> After the initiation of Antabuse treatment the Medical Provider will schedule an initial follow-up 10-14 days later to repeat hepatic function tests. (Emphasis supplied).

Dr. Cullison testified, that if Teresa Luke had been seen in follow-up by Mr. Goodwin in the middle of May (60 days following the start of the Antabuse therapy), "it's likely that the damage to her liver would have been less severe had that occurred."

Another expert called by defense was Jeffrey Fullman, M.D., a Board certified internist. Dr. Fullman felt that reasonably prudent care of a patient placed on Antabuse involves doing liver function tests, including follow-up lab testing. As he testified on December 7, 2005:

> Q. Would it be fair to say that it would be below the standard of care for a health-care provider not to do a follow-up liver function test at some point on a patient that they've started on Antabuse?
>
> A. It would be best to have done liver function tests or do liver function tests on a patient who is on Antabuse at some point.

Dr. Fullman testified that he would typically repeat follow-up labs at between four and eight weeks and that, in this case, if liver function tests had been carried out between March 22 and May 6 (which is 10 days to 54 days after the Antabuse was started), those liver function tests would have been abnormal.

> Q. Would it be fair to say that more likely than not if liver function tests had been carried out between March 22 -- which would be 10 days after she started the Antabuse -- to May 6, that during that time period, if liver function tests had been done at some point, more likely than not that would have revealed the subfulminant hepatitis?
>
> A. **More likely than not the liver function tests would have been abnormal during that time frame you described**. (Emphasis supplied).

Even defendant's own experts acknowledge that beginning 10 days after initiating Antabuse, liver function tests would have been abnormal. Dr. Fullman's deposition was taken on December 7th, which was prior to plaintiffs' response to defendant Clinic's motion for summary judgment and over two and a half months before trial on February 27, 2006. Defendant is in no way prejudiced or harmed.

G. Plaintiffs Expert Monique Martel, ARNP, who Prescribes and Monitors Antabuse, Testified That Liver Function Studies would be Elevated Beginning Prior to Two Weeks

On August 29, 2005, defense counsel deposed Monique Martel, ARNP, from Denver, one of plaintiffs' experts. She prescribes and monitors patients on Antabuse and rendered her opinion that the enzymes would be elevated beginning at two weeks following initiation of Antabuse. She testified in response to defendant Clinic's counsel questioning as follows:

> Q. Okay. What I'm really asking you is not when it could have. Just as an expert witness, have you gone through to analyze this situation to determine at what point you feel confident, or at least at a more probable than not basis, her hepatic panel would have shown elevation?
>
> A. You are talking about based on my patients, what I have seen, as far as my patients?
>
> Q. As far as your expertise?

A. Okay, because I certainly have seen that within the first—if you see a patient within two to four weeks, you will pick up something the majority of the time. And if you wait too long, those liver enzymes continue to increase. So I just – this is so important to immediately check those liver enzymes, because they kick in so quickly. They have to be—you have to catch it immediately.

H. The District Court Erred in Its Application of The Federal Rules of Civil Procedure and Case Authority.

Fed. R. Civ. P 26(e) states in pertinent part:

(e) Supplementing Disclosures and Responses.

(2) *Expert Witness.* For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due. (Emphasis supplied)

In this case, the parties' pretrial disclosures were due January 26, 2006. CR 26. Plaintiffs still had almost 6 weeks pursuant to this rule in order to supplement opinions and expected testimony of experts. The declarations submitted in response to the summary judgment motion on December 12 were not only consistent with the requirements for contravening affidavits pursuant to Fed. R. Civ. P

56 but also timely and consistent with or Fed. R. Civ. P 26(a)(3) and Fed. R. Civ. P. 26(e). There was no violation of Fed. R. Civ. P 26(a)(2)(B) or CR 26(a)(3).

Fed.R.Civ.P 37 states in pertinent part:

> (c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.
>
> (1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
>
> (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
>
> (B) may inform the jury of the party's failure; and
>
> (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)-(vi).

The Ninth Circuit relies on Yeti by Molly v. Deckers, 259 F.3d 1101 (CA 9 Mont 2001), as support for its ruling affirming the district court's dismissal. Yeti is easily distinguished.

In Yeti, the court excluded damages testimony by a defense expert where there was no expert report provided for two years following close of discovery and only one month before trial. Clearly

in this case the reports and depositions were provided timely and again the only assertion is that somehow plaintiffs' experts declarations are in conflict (e.g., 10 days versus 2-4 weeks) with the disclosures, which is not true as stated before.

The striking of plaintiffs' expert declarations by the district court, apparently in their entirety, is a severe sanction that is unjust and unfair to the plaintiffs' case and deprives plaintiff of her day in court to litigate her case on the merits. Any sanction must be "just." Bonds v. District of Columbia Department of Corrections, 93 F.3d 801 (U.S. App. D.C. 1996). In Bonds, the district court entered an order disallowing the defendant to call any fact witnesses for failure to respond timely to interrogatories requesting names of persons with knowledge of the facts. The court held at p. 804 that: "Because the preclusion order denied the District its right to a trial on the merits, we conclude that the district court abused its discretion." The court held that the central requirement of Rule 37 is that "any sanction must be 'just,'" Insurance Corp. v. Compagnie des Bauxites de Guinee, 456 U.S. 694 (1982). The court went on to hold at p. 809 as follows:

> When a discovery sanction denies the defendant the right to a trial on the merits, the district court must either make a finding supported by the record that the more severe sanction is necessary to avoid prejudice to the plaintiffs or to the court's calendar or to prevent a benefit to the defendant.....

In Tucker v. Ohtsu Tire and Rubber, 49 F.Supp.2d 456 (D. Maryland 1999), the trial court dealt with a plaintiffs' tire expert who identified two additional opinions in his deposition that were not contained in the disclosure of his testimony.

The expert then did some additional testing some months later and 10 days prior to the discovery cut off, plaintiffs' counsel notified defense of additional opinions. Defense brought a motion to exclude any new opinions. The trial court denied the motion and held at p. 460 that the deposition testimony was a form of supplementation permitted by Rule 26(e)(1) and that the additional opinions regarding the later testing would be allowed since disclosure was within the discovery cutoff and in that case, 4 months before trial with adequate time for another deposition should that be necessary.

Similarly, in Gulfstream v. Philips, 2007 WL 4707080 (D. New Mexico 2007), a defense expert, whose report was not submitted timely, was allowed to testify because the court felt that the parties could minimize any harm that the late disclosure of the report had caused and that the trial schedule would not be interrupted. The court noted that there were still depositions ongoing and that there were still 3 months before trial and that while defense counsel had not exercised the utmost due diligence, the conduct was either harmless or that any harm could be mitigated. This same principle would apply to the case at bar with sufficient time to prepare for trial some two and a half months away.

In Vaughn v. U.S., 542 F. Supp.2d 1331, the district court dealt with a wrongful death claim arising out of medical care. A treating physician, who held an opinion regarding the cause of death, was not disclosed as an expert, only as a treating physician and the court determined no expert report was necessary. The court in Vaughn was faced with the issue of if the testimony was excluded, the case would be dismissed for lack of causation testimony, an issue nearly identical to the one here. The court cited several cases for the proposition that a treating physician was not required to prepare an expert report, Bengston v.

Bazemore, 2007 WL 3307204 (M.D. Ala. 2007), Pellon v. Business Representation, 2007 WL 2994077 (S.D. Fla. 2007), and McKee v. USAA Ins. Agency, 2006 WL 3422238 (N.D. Fla. 2006). The court held that the scheduling order was not violated but reopened discovery for a further deposition of the treating physician and awarded attorney fees for the motion to exclude.

In Fidelity National Title Ins. v. Intercounty National Title Ins., 412 F.3d 745 (7th Cir. 2005), the exclusion of an expert accounting witness was at issue in a case of alleged fraud. The trial court excluded the testimony of plaintiff's only accounting expert based on a failure of the accountant to produce notes that had been generated by him for the litigation. The matter proceeded to trial, the defendants prevailed and the Seventh Circuit reversed and remanded for a new trial with instructions to allow the accountant to testify holding that the exclusion of the testimony could not be deemed harmless. In reversing, the court stated at p. 752 that "in admeasuring sanctions for violating the rules of pretrial discovery, as in other areas of the law, the punishment should fit the crime." Rice v. City of Chicago, 333 F.3d 780, 784 (7th Cir. 2003); Melendez v. Illinois Bell Telephone Co., 79 F.3d 661, 672 (7th Cir. 1996). Here, if there is a "crime," the punishment of exclusion and dismissal is too severe.

In Commonwealth Insurance Co. v. Titan Tire Corporation, 398 F.3d 879 (7th Cir. 2004), the court dealt with claims of indemnity following settlement of a products liability case. Defendant relied on deposition testimony of a plaintiff expert in the underlying tort suit. Plaintiff in the indemnity action sought to exclude that witness for failing to properly disclose the opinion. The motion was denied finding that any discovery violation was harmless since the indemnity plaintiff had

participated in the expert's deposition in the tort case and answers to interrogatories in the indemnity claim made reference to the indemnity defendant's intention to rely on the expert and there was therefore adequate notice. Similarly here, to the extent any portion of the expert declarations are deemed to be violative of any discovery order or discovery rules, defendant has had full and adequate notice of the expert opinions, has had the opportunity to explore them in depositions, knew of them prior to discovery cut off and knew of them from his own experts, all well in advance of trial.

In this case, it would appear, in the apparent absence of any statement to the contrary by the district court judge, that all of plaintiffs' expert declarations are stricken in their entirety. Plaintiffs urge that there is nothing at all that is inconsistent between the disclosures and the declarations.

The only single fact that is not contained in the disclosures is the fact that the experts believe that the abnormal results would first have been detectable at 10 days following initiation of Antabuse. This one fact is in no way inconsistent with plaintiffs' expert statements that the results would have been abnormal during the two to four week time period when follow-up testing should have occurred. This simply establishes when the elevated enzymes would first have been detectible and it in fact supports the disclosure and deposition testimony that the values would have been elevated during the two to four week period following initiation of Antabuse.

The court in determining a decision on a motion to strike, while being vested with discretion, may, pursuant to Fed. R. Civ. P. 56, strike all improper portions of an affidavit used to support or oppose a summary judgment. The court, however, should use "a scalpel, not a butcher knife." Perez v.

Volvo Car Corp., 247 F. 3d 303, 315 (1st Cir. 2001). The court will allow all properly stated facts, while only striking the improper portions. Hollander v. Am. Cyanamid Co., 172 F. 3d 192, 198 (2d Cir. 1999); Lee v. Nat'l Life Assurance Co. of Canada, 632 F. 2d 524 (5th Cir. 1980). Here, the district court failed to be specific and limiting in exactly what part of the declarations it would disregard and apparently is disregarding all of them in their entirety. Applying this principle, the only portion of the declarations which could even be arguably disregarded is the reference to the abnormal liver function tests being first detectible at 10 days. There would still remain, as admissible testimony, everything else, including the inference, which plaintiffs are entitled to, that the enzymes would have been elevated during the two to four week period, thereby precluding summary judgment.

In Outley v. City of New York, 837 F.2d 587 (2d Cir. 1988), the court held that plaintiff failed to identify several potential eyewitnesses to alleged police brutality and excluded the witnesses from testifying. Following a defense verdict, the Second Circuit held on appeal that while the district court has wide discretion in punishing failures to comply with discovery, in this case, it was an abuse of discretion. The court stated at p. 590: "However, we have not hesitated to reverse when a trial court 'permit'[s] in its zeal for clearing its calendar to overcome the right of a party to a full and fair trial on the merits." Citing Beary v. City of Rye, 601 F.2d 62, 63 (2d Cir. 1979). The court in Outley went on to state at p. 591 as follows:

> Before the extreme sanction of preclusion may be used by the district court, a judge should inquire more fully into the actual difficulties which the violation causes, and must consider less drastic responses. "Considerations of fair play may dictate

> that courts eschew the harshest sanctions ... where failure to comply is due to a mere oversight of counsel amounting to no more than simple negligence." Cine Forty-Second Street Theatre Corp v. Allied., 602 F.2d 1062 at 1068. Here the trial judge failed to do either. Hence we must reverse as to the 1984 incident.

Courts have clearly sought out remedies to avoid striking witnesses altogether that would result in dismissal on procedural grounds favoring decisions on the merits.

I. A District Court is Required to Give All Inferences in Favor of the Plaintiffs Herein as Non-moving Parties.

In ruling on a motion for summary judgment, the trial judge's function is not to himself weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial. The law is well established that in reviewing a motion for summary judgment, the court must construe all facts and inferences in the light most favorable to the non-moving party. Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 106 S.Ct. 2505, 91 L.Ed 202 (1985).

As stated in the dissent by the Circuit Judge M. Smith in the Ninth Circuit decision in which review is sought:

> Luke's initial expert testimony, submitted into evidence far in advance of the discovery deadline, indicated that she would more probably than not have shown abnormal liver functions two to four weeks after she began taking the drug, which, we must reasonably infer, would more probably than not have been

manifest in the tests that should have been given during that time period of two to four weeks.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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